

FINAL REPORT

EXECUTIVE SUMMARY

The Disposition of Nebraska Capital and Non-Capital Homicide Cases (1973-1999); A Legal and Empirical Analysis

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Executive Summary

I. Introduction

This report examines decision-making in the disposition of over 700 Nebraska homicide cases that resulted in a criminal conviction between 1973 and 1999.¹ The research was undertaken pursuant to a decision of the Nebraska Legislature to support a study of Nebraska homicides with a focus on fairness. Pursuant to the enabling legislation, the Nebraska Commission on Law Enforcement and Criminal Justice (the “Crime Commission”) authorized the study. The universe of the study is all criminal homicides committed after April 20, 1973, and before December 31, 1999.

The principal focus of the report is on decision-making in 177 death-eligible homicides processed between 1973 and 1999 that resulted in the imposition of 27 death sentences. We identified this pool of death-eligible cases in a case by case screen of the universe of over 700 cases.

The test we used for identifying death-eligible cases in the broader universe of cases has two parts. The first part focuses on first-degree murder (M1) convictions. We classified M1 cases as death-eligible if (a) they advanced to a sentencing hearing under Neb. Rev. Stat. Section 29-2520 and (b) the court addressed the issue of whether the sentence should be life or death. For M1 convictions that did not advance to a sentencing hearing because of a waiver of the death penalty by the state, we classified the case as death-eligible if the facts clearly established that one or more statutory aggravating circumstances was present in the case.

Second, we classified cases as death-eligible that resulted in a conviction for a crime less than M1 if (a) the conviction was pursuant either to an initial charge of less than M1 or a plea bargain that reduced an initial M1 charge to the lesser offense and (b) the facts clearly

established the presence of the mens rea (mental state) required for M1 and one or more statutory aggravating circumstances in the case.

In all of these death-eligible cases, we examined prosecutorial charging and plea bargaining decisions, as well as the prosecutorial decision to advance first-degree murder cases to a penalty trial. In the 81 first-degree murder cases that advanced to a penalty trial with the State seeking a death sentence, the study focused on the judicial decisions that resulted in 27 death sentences.

In the analysis of the death-eligible cases, we first examine the impact of defendant culpability on charging and sentencing outcomes. We then examine three issues relating to fairness in the administration of the death penalty: (a) geographic disparities, (b) disparities based on the race, gender, religious preference and socio-economic status of the defendant and the victim, and (c) the extent to which the 27 defendants sentenced to death can be meaningfully distinguished from the 150 death-eligible offenders who received a sentence less than death (death sentences that fail to meet this standard are known as “comparatively excessive”).

Finally, the study examines decision-making in the homicides that we have determined were not death-eligible either because the defendant lacked the mens rea (mental state) required to support a first-degree murder conviction or there was no statutory aggravating circumstance present in the case. For these cases, we examined prosecutorial charging decisions, the crime of conviction, and the sentencing decision.

¹ A description of the cases addressed in this study is provided in Section IV.A.1 of the report.

II. Methodology, Research Design, and Measures

A. Methodological Overview

The first and principal part of this research focuses on all death-eligible defendants, regardless of how the prosecutor charged them and whether or not their cases advanced to a penalty trial. The Data Collection Instrument ("DCI") used to code these cases is a modified version of instruments developed in other similar studies. It includes for capital murder cases quantifiable measures of the strength of evidence for each of the statutory aggravating and mitigating circumstances. These measures allow us to examine the impact of statutory aggravating and mitigating circumstances on both prosecutorial and judicial decision-making. A second and subsidiary part of the research embraces non-capital homicides. We coded these cases with a smaller data collection instrument that was completed in the process of screening all the cases to identify those that were death-eligible.

Our analysis of the capital murder cases utilizes a series of measures of defendant culpability. The first set of measures has three parts: (1) a count of the number of statutory aggravating circumstances found or present in each case, (2) a count of the statutory mitigating circumstances found or present, and (3) a count of both aggravating *and* mitigating circumstances. The second "salient factors" measure classifies cases qualitatively in terms of the principal aggravating factor either found or present in the case and the presence of other relevant statutory aggravating and mitigating circumstances. The third measure is based on the results of logistic regression analyses.

Each of these measures of defendant culpability is based on a different but legally relevant foundation, and each provides an independent basis for estimating the scope and

magnitude of geographic, race, and socio-economic status (“SES”) disparities in the system after controlling for defendant culpability.

Our principal measure of geographic disparity contrasts Nebraska’s three largest and most urban counties, Douglas County (including the City of Omaha), Lancaster County (including the City of Lincoln), and Sarpy County (including the City of Bellevue and parts of Omaha), with the rest of the state, which we characterize as “greater Nebraska.” The distinction between the major urban centers of the state and greater Nebraska is not an “urban” v. “rural” distinction. We also recognize that there are important distinctions, some of which we describe below, between charging and sentencing practices in Nebraska’s two largest counties, Douglas County and Lancaster County.

1. Case Screening Plan and Data Sources

We identified the potential universe of Nebraska criminal cases from April 20, 1973 to December 31, 1999 with a statewide case list and other case identifying techniques. The primary source for identifying these cases is a list of Nebraska homicide cases generated by the Records Administrator for the Department of Corrections. According to the Department of Corrections, this list contains all homicide crimes for which a defendant was convicted and sentenced to serve any amount of prison time. In addition, we conducted a comprehensive electronic search of all reported Nebraska cases and reviewed the Criminal Homicide Reports that each County Attorney is required to file with the State Court Administrator’s Office following the prosecution of each homicide. Finally, we requested each County Attorney to review our list of homicides that were committed during the study period and identify any cases that were not in our identified universe of cases. With this information, we developed a screening plan designed to identify (a) all of the homicides committed in Nebraska during the study period that resulted in a homicide conviction

and (b) which of these cases were death-eligible under Nebraska law. For each of these cases we coded a 15 page data collection instrument, known as the Initial Screening Instrument (“ISI”). For each of the cases that we identified as death-eligible, we completed a detailed data collection instrument (“DCI”).

A major challenge in this type of research is obtaining reliable data on the cases. A defendant’s pre-sentence investigation report served as the first and best source of information regarding a particular defendant, the facts of a particular homicide, and witness information. A pre-sentence investigation report includes a detailed description of the defendant that is generated by a probation officer following a criminal conviction. In particular, the PSI will often contain descriptive information regarding the physical, mental, and emotional health of the defendant. It discusses the defendant’s personal family history, ordinarily contains the defendant’s personal criminal history, and sometimes contains a description of the victim. The PSI also often contains a description of the crime that is generated from the trial record, police reports, and interviews with the defendant.

At the outset of the study we attempted to collect a copy of PSI and Department of Corrections Classifications Study for each defendant in our universe of potentially death-eligible cases from the Department of Corrections Records. In the cases in which the Department of Corrections did not have a PSI, we contacted each state probation district and requested a copy of the pre-sentence investigation report. The PSIs were often available from the State probation offices. However, sometimes, as a result of the document retention policies of the State Probation Office, PSIs were unavailable. In those cases, we requested the District Court where the case was originally tried to provide us with the original court record of the case and any bills of exception that were generated in the case.

We relied on the study files containing the information described above to screen cases for death-eligibility. As each case was reviewed, law student coders completed the Initial Screening Instrument (ISI).

Once it was determined that a case was death-eligible, we undertook an additional stage of case file information development. For all penalty trial cases, including death-sentenced cases, the most important additional data sources were the record of the trial and sentencing, if available, (especially the bill of exceptions of the penalty trial and the trial court's sentencing order), the opinion of the Nebraska Supreme Court if the case was appealed, and the briefs of the State and the defendant.

We obtained information on the racial and social background of the defendant from the PSI and the Department of Corrections Classification Study. Death certificates provided the primary data source for information regarding the demographic background of the victim.

2. Data Coding and Entry

The case files described above provided the basis for the case coding process conducted in Lincoln, Nebraska during the Summer and Fall of 2000. The data collection instrument for the non-capital cases – the “ISI” – contains 138 entries. In addition, the coders completed thumbnail sketches of each non-capital case. The data collection instrument used to code the capital murder cases – the DCI – contains over 500 entries for each case. Each coder also completed a detailed narrative summary and a five to ten line “thumbnail sketch” for each case.

The procedural coding for each statutory aggravating and mitigating circumstance and its strength of evidence measure were individually reviewed and verified. Project staff handled all data entry for the ISI, DCI, and the narrative summaries. A project staff member not involved with the data entry visually checked the data entered against each DCI to flag data entry errors.

3. Measures of Defendant Culpability

One's confidence in the inferences suggested by a study of this type depends on the validity of the measures of "defendant culpability" that provide a basis for comparing similarly situated defendants. For example, to what extent was the murder premeditated and planned? The second dimension is the defendant's personal responsibility for and role in the murder, or any contemporaneous crimes. The third dimension of culpability is the defendant's character, including a review of his or her prior criminal record.

The study's measures of defendant culpability are important because they provide an objective basis to define groups of similarly situated offenders. With such groups defined, comparisons can be made to determine if similarly situated offenders are treated differently because of their race or socio-economic status or the race or socio-economic status of their victims. These assessments provide the basis for assessing concerns about *disparate treatment* in the system. Disparate treatment exists when prosecutors or sentencing judges, in the exercise of their discretion, treat similarly situated offenders differently on the basis of illegitimate or suspect factors. In contrast to disparate treatment, *disparate impact* exists when the evenhanded application of a facially neutral policy disadvantages a particular group.

Our measures of defendant culpability also enable us to define groups of similarly situated offenders as a foundation for addressing concerns about consistency and comparative excessiveness in the system, without regard to the race and socio-economic status of defendants and victims. In such analyses, the issue is how frequently are similarly situated offenders sentenced to death.

Because of the crucial role of defendant culpability in this research, we used the following four independent measures of defendant culpability that have been utilized with success in other similar studies.

a. The Number of Statutory Aggravating and Mitigating Circumstances Found or Present in the Cases: Three Measures

The first measure of defendant culpability is the number of statutory aggravating circumstances found by the penalty trial court or present in each non-penalty trial case. The second measure under this heading is a count of the number of mitigating circumstances found or present in the cases. The third measure under this heading is the number of both aggravating *and* mitigating circumstances combined, e.g., two aggravators and one mitigator.

b. The Salient-Factors Measure

The second “salient factors” measure of culpability is used by some state courts in their proportionality reviews of death-sentenced defendants. This straightforward measure classifies each case initially in terms of its most prominent statutory aggravating circumstance and then subclassifies it on the basis of other statutory aggravating and mitigating circumstances in the case. The salient factors measure we rely on in this research (presented in Appendix A) is modeled on a measure developed in 1999 by Judge David Baime, Special Master to the New Jersey Supreme Court for Proportionality Review. This measure shares the strengths of the measures based on counts of aggravating and mitigating circumstances.

c. Logistic Regression-Based Measures

This set of measures is based on the results of logistic multiple regression analyses that estimate the impact of case characteristics (legitimate, illegitimate, and suspect) on charging and sentencing outcome decisions in capital cases. However, the culpability scales developed in this analysis reflect only the impact of the legitimate case characteristics.

We first developed a logistic regression model of death sentences imposed among all death-eligible cases. The regression coefficients estimated in this analysis reflect the combined impact of all decisions taken by prosecutors and sentencing judges.

We also estimated "decision-point" logistic regression models that focus on the successive stages at which prosecutors and judges advance the cases through the system. For example, what case characteristics best explain which cases (a) advanced to a penalty trial with the state seeking a death sentence, and (b) resulted in a death sentence being imposed in penalty trial.

III. Summary of Principal Findings and Conclusions.

The analysis produced several statistical findings that are relevant to the concerns addressed by the Nebraska Legislature and the Nebraska Crime Commission in its Request for Proposals.

1. There is No Significant Evidence of the Disparate Treatment of Defendants Based on the Race of the Defendant or the Race of the Victim.²

a. Race-of-Defendant Disparities. Our first finding is that there is no significant evidence of disparate treatment on the basis of the race of defendant. Among all death-eligible cases, the death-sentencing rate for white offenders is .15 (20/130) and for racial minorities it is .16 (7/45). In the penalty trial death-sentencing decisions, the rate is .36 (20/56) for white defendants and .29 (7/24) for minority defendants. Neither of these disparities is statistically significant. When we introduced controls for defendant culpability, there are also no significant race-of-defendant effects in the death-sentencing data.

² See Section VII for detailed findings.

Statewide, white defendant cases advance to a penalty trial at a rate of .43 (56/131) while in minority defendant cases the rate is .54 (25/46). This disparity is not statistically significant. When controls for defendant culpability are introduced, this statewide disparity persists and becomes statistically significant when some measures of defendant culpability are applied but remains insignificant when others are applied.

However, when the analysis takes into account whether the cases are prosecuted in a major urban county or a county of greater Nebraska, the statewide white defendant disparity evaporates. The reason it does is that almost 90% of the prosecutions against minority defendants take place in major urban counties where the rate that cases advance to a penalty trial is nearly twice as high as it is in the rest of the state. This is what produces the statewide white defendant disparity. When the focus is on the two areas of the state separately, there are no significant race-of-defendant effects in either place. In short, the data do not support an inference that similarly situated defendants are treated differently on the basis of their race.

b. Race-of-victim. We also found no significant evidence of disparate treatment on the basis of the race of the victim. Among all death-eligible cases, the death-sentencing rate in white-victim cases is .17 (24/145) and in minority-victim cases it is .11 (3/28). In the penalty trial death-sentencing decisions, the rate is .36 (24/66) for white-victim cases and .21 (3/14) for minority-victim cases. White-victim cases advance to penalty trial at a rate of .46 (67/147), while the rate is .50 (14/28) for minority-victim cases. None of these disparities is statistically significant.

When we introduced controls for defendant culpability there are no significant race-of-victim effects in the data. This conclusion holds for prosecutors and judges statewide and within the major urban counties and the counties of greater Nebraska. In short, the data do not support

an inference that similarly situated defendants are treated differently on the basis of their victim's race.

c. Defendant/Victim Racial Combination. We also found no significant evidence of disparate treatment in cases involving minority defendants and white victim. Among all death-eligible cases, the death-sentencing rate in minority defendant/white-victim cases is .22 (5/23) and .14 (22/152) for all other cases. In the penalty trial death-sentencing decisions, the rate is .38 (5/13) for minority defendant/white-victim cases and .33 (22/67) for all other cases. None of these disparities is statistically significant.

When we introduce controls for defendant culpability, there are no significant race effects in the penalty trial death-sentencing data. However, in contrast to the analysis of the race-of-defendant and race-of-victim effects, the analysis of the minority defendant/white victim effects showed a consistent pattern of disparities that were adverse to minority defendants with white victims. But because the disparities are not statistically significant and they are based on small samples, they do not support an inference that minority defendants with white victims are sentenced to death at a higher rate than other defendants with comparable levels of culpability.

Minority defendant/white-victim cases advance to penalty trial at a rate of .58 (14/24), while the rate is .44 (67/153) for cases with all other defendant/victim racial combinations. When controls for defendant culpability are introduced, the statewide data show disparities along the same lines as the white defendant disparities described above, i.e., minority defendant/white victim cases are more likely to advance to a penalty trial. However, when the analysis takes into account whether the cases are prosecuted in a major urban county or the counties of greater Nebraska, the statewide minority defendant/white victim disparity evaporates for the same reason that the white defendant effect described above evaporates.

2. Compared to Other Jurisdictions, the Nebraska Capital Charging and Sentencing System Appears to be Reasonably Consistent and Successful in Limiting Death Sentences to the Most Culpable Offenders.³

Our second finding is that compared to other death sentencing jurisdictions for which data are available, the Nebraska capital charging and sentencing system appears to be reasonably consistent and successful in limiting death sentences to the most culpable offenders. A good measure of the consistency of the system is that 52% (14/27) of the death sentences were imposed in cases in which over 70% of other offenders with a similar level of culpability were sentenced to death. In this regard, the number of statutory aggravating circumstances has a particularly important influence in determining which death-eligible cases advance to a penalty trial and were sentenced to death. However, in 26% (7/27) of the death sentences imposed, the death sentencing rate among other similarly situated offenders was less than 50%.

The discriminating nature of the Nebraska system (in terms of defendant culpability) appears to be principally the product of selectivity on the part of the sentencing judges. Since 1978, the sentencing judges have been required by legislation to consider issues of comparative excessiveness in their sentencing considerations and are no doubt aware of the legislature's expressed concerns about arbitrariness and comparative excessiveness. The sentencing judges see many death-eligible cases face to face and in the reported cases, and may talk with one another about what qualifies as a death case. Indeed, the data are consistent with the application of a judge made standard to the effect that for cases with three or more statutory aggravating circumstances found, a death sentence is almost certain, for cases with two aggravators found, the outcome can go either way depending on the facts, and for cases with only a single aggravator found, there is a very strong presumption in favor of a life sentence. Only one case with a single statutory aggravating circumstance has resulted in a death sentence. The data

³ See Sections V & IX for detailed findings.

suggest that the legislative amendments of 1978 may have had a meaningful impact on the consistency of Nebraska's judicial death sentencing outcomes.

3. The System is Characterized by Sharp Differences in Charging and Plea Bargaining Practices in the Major Urban Counties vis a vis the Counties of Greater Nebraska.⁴

Our third finding is that the system is characterized by sharp differences in charging and plea bargaining practices in the major urban counties vis a vis the counties of greater Nebraska. In the major urban counties, prosecutors appear to apply quite different standards than do their counterparts elsewhere in the state in terms of their willingness to waive the death penalty unilaterally or by way of a plea bargain. The difference is captured in the fact that after adjustment for the culpability of the offender, death-eligible cases in the major urban counties are nearly twice as likely to advance to a penalty trial with the state seeking a death sentence as are comparable cases in greater Nebraska.

These geographic disparities have existed since 1973 and have grown larger since 1982.

The geographic disparities in the rates that cases advance to penalty trials are not explained by differing levels of defendant culpability. Nor are they explained by financial considerations, the experience of prosecutors in handling and trying capital cases, or the attitudes of the trial judge about the death penalty.

The data indicate that the differences between charging and plea bargaining practices of prosecutors in the major urban counties and those in greater Nebraska produce a statewide "adverse disparate impact" on racial minorities. This adverse impact flows from the difference in the rates that prosecutors advance similarly situated death-eligible cases to penalty at trial. Although the data indicate that in both segments of the state, prosecutors prosecute whites and minorities evenhandedly, prosecutors in the major urban counties advance cases to penalty trial

at rates that are substantially higher than the rates that prosecutors in the counties of greater Nebraska advance cases to penalty trial.

As a result, because almost 90% of the minority defendants charged with capital murder in Nebraska are prosecuted in the major urban counties, the practical effect of the difference in the rates that prosecutors advance cases to penalty trials is that statewide minority defendants face a higher risk that their cases will advance to a penalty trial (with the state seeking a death sentence) than do similarly white defendants statewide.

The source of this adverse impact is (a) state law, which delegates to local prosecutors broad discretion in the prosecution of death-eligible cases, and (b) the fact that racial minorities principally reside in the major urban counties of Nebraska. This adverse impact on minorities is analogous to the adverse impact on minorities that exists in states where local appropriations for the support of public education are lower in the communities in which minorities reside than they are in predominately white communities. This finding does not suggest or intimate that the Nebraska death sentencing system is racially biased. Our findings are quite to the contrary. One may characterize this adverse disparate impact as simply a fluke produced because minorities happen to live in major urban areas at higher rates than they do in greater Nebraska.

The data also indicate that in spite of the adverse impact described above in the rates that cases advance to penalty trials, there is no statewide adverse impact against minorities in the imposition of death sentences. The reason for this is that the sentencing practices of the penalty trial judges offset the adverse impact on minorities of the differential charging practices in the major urban and greater Nebraska counties described above. As we explain in the next section, the judges in the major urban areas impose death sentences at a rate lower than the statewide average, while just the opposite is the case for the judges in the other counties. The bottom line,

⁴ See Section VI for detailed findings.

therefore, is an essentially evenhanded racial distribution of death sentences among death-eligible offenders statewide. During the entire period covered by this study, the death sentencing rate among all death-eligible offenders has been .15 for white defendants and .16 for defendants who are racial minorities.

4. The System is Characterized by Geographic Disparities in Judicial Death-sentencing rates that Since the Mid-1980s Have Tended to Neutralize the Effects of Geographic Disparities in the Rates That Prosecutors Advance Cases to a Penalty Trial.⁵

In the first decade under the new death sentencing system (1973-1982), the death-sentencing rates in the major urban counties and in the counties of greater Nebraska were comparable (.38 v. .35). However, because of the considerably higher rates at which death-eligible cases advanced to penalty trial in the major urban counties, compared to the counties of greater Nebraska, the overall death sentencing rate in the major urban areas was twice as high as it was in the other counties, i.e., - .27 v. .13.

Since the mid-1980s, changes in sentencing practices in the major urban areas have reversed this disparity. Specifically, since 1982 the judicial death-sentencing rate in the major urban counties has declined nearly 50% (from .38 to .20), while during the same period, the death-sentencing rate in the counties of greater Nebraska has declined only slightly (from .35 to .31). As a result, since 1982 the penalty trial death sentencing rate has been 50% lower in the major urban counties than it has been in the counties of greater Nebraska (.20 v. .31).

Both the decline in death-sentencing rates documented in the major urban counties since the early 1980s and the decline in the overall death sentencing disparity between the major urban counties and the counties of greater Nebraska may be attributable, in part, to the 1978 legislative amendments that address this issue. As noted above, those amendments require sentencing

⁵ See Section VI for detailed findings.

judges to conduct a comparative proportionality review in the death sentencing process. These amendments also contain “findings” that serious disparities in capital charging and sentencing outcomes existed in the state, which our data confirm.

A significant consequence of these geographic disparities in judicial death-sentencing rates is that they tend to neutralize the effects of the geographic disparities in prosecutorial decisions. Specifically, since 1982 the penalty trial death-sentencing rates in the major urban centers have minimized the effect of the higher rates that cases advance to penalty trials in those counties. Similarly, the higher than average judicial sentencing practices in the counties of greater Nebraska offset the effects of the lower than average penalty trial rates of their prosecutors. The bottom line is that among all death-eligible cases, the death-sentencing rates in the two areas of the state since 1982 have been – .09 in the major urban counties and .14 in the counties of greater Nebraska.

5. The Impact of Defendant and Victim Socio-Economic Status (SES) on Charging and Sentencing Outcomes.⁶

a. There are No Statistically Significant Disparities in Treatment Based on the Socio-Economic Status of the Defendant.

Our statewide sample of 177 capital murder cases includes five defendants classified as “high” socio-economic status. One of these defendants advanced to a penalty trial and none received a death sentence. However, because of the small sample of cases in this category, the disparity is not statistically significant. Nor are there significant disparities in the treatment of low SES defendants compared to other defendants.

⁶ See Section VIII for detailed findings.

b. The Data Reveal Significant Disparities in the Treatment of Defendants Based on the Socio-Economic Status of the Victim.

The data document significant statewide disparities in charging and sentencing outcomes based on the socio-economic status of the victim. Specifically, since 1973 defendants whose victims have high socio-economic status have faced a significantly higher risk of advancing to a penalty trial and receiving a death sentence. Defendants with low SES victims have faced a substantially reduced risk of advancing to a penalty trial and of being sentenced to death. Among all death-eligible cases after adjustment for defendant culpability, the rate that cases advance to a penalty trial is 1.8 (.64/.35) times higher in high SES victim cases than it is in low SES victim cases. Also, the death sentencing rate among all death-eligible cases is 3.7 (.22/.06) times higher in the high victim SES cases than it is in the low SES victim cases. The low victim SES effects are stronger than the high victim SES effects.

When the focus shifts from the state as a whole to SES effects estimated separately within the major urban counties and the counties of greater Nebraska, the high SES victim effects are concentrated in the greater Nebraska counties. The low SES victim effects are apparent throughout the state.